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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

MICHAEL THOMAS CREHAN and
SUZANNE TETREAULT CREHAN,
Petitioners,

v.

GRETCHEN DEBOER, and
all others similarly situated, *et al.*,
and MELLON MORTGAGE COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In a nationwide class action settlement purporting to resolve the money damages claims of the plaintiff class, were absent class members improperly denied a right to opt out under Federal Rule of Civil Procedure 23 or the Due Process Clause of the Fifth Amendment?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 2

JURISDICTION 2

RULE INVOLVED 2

STATEMENT OF THE CASE 3

1. Escrow Account Practices 4
2. Procedural History 5
3. Terms of the Settlement 6
4. Decision Below 8

REASONS FOR GRANTING THE WRIT 10

The Court of Appeals' Decision Denying Petitioners the Right to Opt-Out to Pursue their Claims for Money Damages is in Conflict with Decisions of Other Courts of Appeals and of this Court 10

1. Rule 23 11
2. Due Process 17

CONCLUSION 23

TABLE OF AUTHORITIES

CASES

Bogard v. Cook,
586 F.2d 399 (5th Cir. 1978),
cert. denied, 444 U.S. 883 (1979) 14

Brown v. Ticor Title Ins. Co.,
982 F.2d 386 (9th Cir. 1992),
writ dismissed as improvidently granted,
114 S. Ct. 1359(1994) 13, 17, 18

Califano v. Yamasaki,
442 U.S. 682 (1979) 11

Crehan, et al. v. Mellon Mortgage Co.,
42 F.3d 1385 (4th Cir. 1994) 8

Crehan, et al. v. Mellon Mortgage Co.,
No. 93-1017-A (E.D. Va. 1993) 7

In re Dennis Greenman Securities Litig.,
829 F.2d 1539 (11th Cir. 1987) 16

Deposit Guaranty Nat'l Bank v. Roper,
445 U.S. 326 (1980) 12

Eisen v. Carlisle & Jacquelin,
391 F.2d 555 (2d Cir. 1968) 14

Eisen v. Carlisle & Jacquelin,
417 U.S. 156 (1974) 11, 12

Elliott v. Weinberger,
564 F.2d 1219 (9th Cir. 1977),
modified on other grounds sub nom.,
Califano v. Yamasaki,
442 U.S. 682 (1979) 13

GMAC Mortgage Corp. v. Stapleton,
603 N.E.2d 767 (Ill. App. Ct. 1992),
appeal denied,
610 N.E.2d 1262 (Ill. 1993) 5, 7

Gulf Oil Co. v. Bernard,
452 U.S. 89 (1981) 11

Hansberry v. Lee,
311 U.S. 32 (1940) 12

Holmes v. Continental Can Co.,
706 F.2d 1144 (11th Cir. 1983) 13

Martin v. Drummond Company, Inc.,
663 So.2d 937 (Ala. 1995),
petition for cert. filed,
64 U.S.L.W. 378 (U.S. Oct. 3, 1995)
(No. 95-548) 22

Martin v. Wilks,
490 U.S. 755 (1989) 12

Mathews v. Eldridge,
424 U.S. 319 (1976) 21

McDonnell Douglas Corp. v. United States Dist. Court,
523 F.2d 1083 (9th Cir. 1975),
cert. denied, 425 U.S. 911 (1976) 16

Mullane v. Central Hanover Bank & Trust Co.,
339 U.S. 306 (1950) 21

Officers for Justice v. Civil Serv. Comm'n,
688 F.2d 615 (9th Cir. 1982),
cert. denied, 459 U.S. 1217 (1983) 13

Penson v. Terminal Transport Co.,
634 F.2d 989 (5th Cir. 1981) 14

Phillips Petroleum Co. v. Shutts,
472 U.S. 797 (1985) 10, 17, 18, 20, 21, 22

Probe v. State Teachers' Retirement Sys.,
780 F.2d 776 (9th Cir.),
cert. denied, 476 U.S. 1170 (1986) 14

In re Real Estate Title & Settlement Servs. Antitrust Litig.,
869 F.2d 760 (3d Cir.),
cert. denied, 493 U.S. 821 (1989) 18, 19

Robinson v. Union Carbide Corp.,
544 F.2d 1258 (5th Cir.),
cert. denied, 434 U.S. 822 (1977) 14

Society for Individual Rights, Inc. v. Hampton,
528 F.2d 905 (9th Cir. 1975) 13

Ticor Title Ins. Co. v. Brown,
114 S. Ct. 1359 (1994) 1, 2, 10, 11, 17, 18, 19, 22

Village Savings Bank v. Caplan,
451 N.Y.S.2d 159 (N.Y. App. Div. 1988) 4

Wetzel v. Liberty Mutual Ins. Co.,
508 F.2d 239 (3d Cir.),
cert. denied, 421 U.S. 1011 (1975) 14

White v. National Football League,
41 F.3d 402 (8th Cir. 1994),
cert. denied, 115 S. Ct. 2569 (1995) 18

STATUTES AND RULES

Fed. R. Civ. P. 12(b)(2) 19

Fed. R. Civ. P. 23 . . . . . passim

12 U.S.C. § 2609 5

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1441(a) 6

28 U.S.C. § 1441(b) 6

REGULATIONS

24 C.F.R. §§ 3500.17(c)(4)-(6), (d) (1995) 3

24 C.F.R. § 3500.17(f)(2) 7

MISCELLANEOUS

5A Charles A. Wright & Arthur R. Miller,
Federal Practice and Procedure
(2d ed. 1990) 19

1 *Newberg on Class Actions* (3d ed. 1992) 14

Overcharging on Mortgages:
Violations of Escrow Account
Limits By the Mortgage Lending Industry:
A Report by the Attorneys General
of California, Florida, Iowa,
Massachusetts, Minnesota,
New York and Texas (April 24, 1990) 4, 5, 7

Rules Advisory Committee Notes to
1966 Amendments to Rule 23,
39 F.R.D. 69 (1966) 12

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On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioners Michael Crehan and Suzanne Crehan hereby petition for a writ of certiorari to review a ruling that is in conflict with decisions of other courts of appeals and of this Court. Petitioners sought to opt out from a class action settlement to pursue their money damages claims against respondent Mellon Mortgage Company, but the settlement did not allow opt-outs and the court of appeals held that an opt-out right was not required by Federal Rule of Civil Procedure 23 or the Due Process Clause. In *Ticor Title Ins. Co. v. Brown*, 114 S. Ct. 1359 (1994), this Court granted certiorari on the due process issue, but later dismissed the writ as improvidently granted principally on the ground that,

if possible, the Rule 23 question—which was not presented in *Ticor*—should be considered first in order to avoid deciding the constitutional question. This petition permits the Court to do what it was unable to do in *Ticor*: consider whether Rule 23 requires that class members be accorded the right to opt out on their money damages claims and, if not, whether the Constitution guarantees that right.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 64 F.3d 1171 (8th Cir. 1995), and is reproduced in the appendix at Pet. App. 1a. The unreported decision of the United States District Court for the District of Minnesota approving the class action settlement is reproduced in the appendix at Pet. App. 14a. A separate unreported decision of the district court regarding attorneys' fees is reproduced at Pet. App. 18a.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 1995. Petitioners filed a timely petition for rehearing on September 11, 1995, which was denied by the court of appeals on October 25, 1995 (Pet. App. 20a). On January 15, 1996, Justice Thomas granted petitioners' application for an extension of time to file this petition up to and including February 22, 1996. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RULE INVOLVED

Federal Rule of Civil Procedure 23 is reproduced in the appendix (Pet. App. 21a).

STATEMENT OF THE CASE

This case involves the settlement of a nationwide class action brought on behalf of present and former customers of respondent Mellon Mortgage Company, one of the nation's largest servicers of mortgage loans. Plaintiffs alleged that Mellon overcharged its customers by requiring them to maintain an excessive escrow account balance in violation of state and federal law. Under the settlement, the class receive a total of $105,000 in damages (less than $1 per class member), class counsel receive $290,000 in attorneys' fees and costs, and Mellon formally implements certain "modified" escrow practices. Mellon's "modified" escrow practices are not new practices, however. Rather, the settlement rewrites each class member's individual mortgage contract to conform the contracts to Mellon's past practices and to allow Mellon to retain *more* in escrow than it had been contractually permitted to retain at the time the suit was filed. Moreover, the escrow practices approved by the settlement are at odds with escrow practices permitted under HUD regulations effective May 24, 1995. *See* 24 C.F.R. §§ 3500.17(c)(4)-(6), (d) (1995).

For purposes of this petition, however, the terms of the settlement are less significant than the important question of federal law that is starkly presented here. Although this suit presented routine consumer claims for monetary damages, the court of appeals affirmed certification of a mandatory, non-opt-out class under Federal Rule of Civil Procedure 23(b)(2). As a result, class members who wished to retain their previous, bargained-for mortgage contracts, and/or to pursue their money damages claims independently, were prohibited from doing so. The question presented here is

whether it was lawful to deny the class members their right to opt out.

1. Escrow Account Practices.

Escrow accounts typically are maintained to enable the mortgage servicer to be sure that the taxes, insurance, and other expenses of the homeowner are paid when they come due. When the mortgage servicer maintains an excess cushion in an escrow account, it receives the equivalent of an interest-free loan from the customer on the excess amount. The practice of requiring and holding excessive escrow account deposits has been widely criticized as illegal. *See Overcharging on Mortgages: Violations of Escrow Account Limits By the Mortgage Lending Industry—A Report by the Attorneys General of California, Florida, Iowa, Massachusetts, Minnesota, New York and Texas* (April 24, 1990) (*"Attorneys General Report"*); *Village Savings Bank v. Caplan*, 451 N.Y.S. 2d 159 (N.Y. App. Div. 1988) (contract-based claim raised as defense to mortgage foreclosure).

Two practices in particular—"preaccrual" and "individual-item analysis"—inflate escrow account deposits held on reserve. "Preaccrual" refers to the practice of requiring the borrower to deposit amounts to cover expenses up to a full two months in advance of their disbursement date. Under "individual-item analysis," the mortgage servicer sets up separate sub-accounts for each escrow item and requires the borrower to maintain a balance in each subaccount sufficient to cover that individual expense, even if the aggregate account balance would cover each expense as it comes due. Individual-item analysis results in a mortgage servicer generating a larger total cushion than it could under an aggregate accounting method. Section 10 of

the Real Estate Settlement Procedures Act ("RESPA") limits the amount of "cushion" a lender may require to be held in an escrow account to no more than 1/6 of the total yearly amounts needed to pay taxes, insurance premiums, and other like expenses, in effect, a two-month reserve. *See* 12 U.S.C. § 2609.

2. Procedural History.

Respondent Gretchen DeBoer filed a class action suit against respondent Mellon in Minnesota state court in August 1992, alleging three state-law causes of action (breach of contract, misrepresentation, breach of fiduciary duty) and a violation of section 10 of RESPA, 12 U.S.C. § 2609. The class included both former and present customers of Mellon. Eighth Circuit Joint Appendix ("JA") 227-28. The complaint described a systematic extraction of monies from class members, "depriv[ing] homeowners of millions of dollars." JA 189. The prayer for relief sought compensatory damages in the form of "a refund of any excess balances plus interest;" declaratory and injunctive relief; attorneys' fees and costs; and other relief as appropriate. JA 193.

The vast majority of Mellon's customers have one of two common types of mortgage contracts: Federal National Mortgage Association ("Fannie Mae") or Federal Housing Administration/ Veterans Administration ("FHA/VA"). *Cf. GMAC Mortgage Corp. v. Stapleton*, 603 N.E.2d 767, 770 (Ill. App. Ct. 1992), *appeal denied*, 610 N.E.2d 1262 (Ill. 1993). Where these mortgage contracts limit or bar preaccrual, the contracts control. *Attorneys General Report* at 14-15. Although the record does not reveal the type of mortgage held by DeBoer, the complaint acknowledges that some class members enjoyed a contractual right to maintain escrow reserves lower than the two-month RESPA

maximum, and it sought an injunction prohibiting Mellon from requiring an escrow reserve "in excess of the cushion authorized by the underlying mortgage contract *or* the RESPA ceiling, *whichever is less.*" JA 193 (emphasis added).

On September 1, 1992, Mellon removed the action to the United States District Court for the District of Minnesota under 28 U.S.C. § 1441(a) and (b), based on the single federal cause of action pleaded, and answered the complaint. JA 181-83, 194-96. More than one year passed without any formal discovery and without the filing of a single pleading or motion of any kind. JA 4 (docket entries). Then, on October 29, 1993, respondents sought certification of a settlement class under Rules 23(b)(1) and (b)(2) and preliminary approval of the proposed settlement.

3. Terms of the Settlement.

The settlement has three principal components: payment of less than $1 in damages to each class member; an award of attorneys' fees that is nearly three times the damages; and adoption of certain escrow practices by Mellon. Rather than reforming the illegal escrow practices denounced in the original complaint, the settlement authorizes escrow practices even more favorable to Mellon than those permissible prior to the commencement of the lawsuit. *First*, the settlement permits Mellon to apply individual-item and preaccrual escrow practices to all customers, regardless of the terms of their mortgage contract. *Second*, the settlement amends all mortgage documents to allow Mellon to hold *the greatest* of the following: (1) the amount calculated using preaccrual and individual-item analysis; (2) the amount provided in the customer's mortgage documents; or (3) the maximum amount

permitted by RESPA, *i.e.*, a two-month reserve. JA 229-32.[1]

Despite the class plaintiffs' attack on preaccrual and individual-item analysis escrow practices in the complaint, the settlement agreement formally institutes both. For customers with Fannie Mae mortgages—a substantial percentage of the class, *see GMAC Mortgage Corp.*, 603 N.E.2d at 770 (forty percent of typical class had Fannie Mae mortgages)—the settlement eliminates favorable contractual terms which appear to forbid preaccrual of any reserve. JA 32; *accord Attorneys General Report* at 14. FHA/VA mortgages limit preaccrual to a one-month reserve. JA 33. Under the settlement, however, Mellon is permitted to maintain the legal RESPA ceiling of a two-month escrow reserve on deposit, regardless of the class member's mortgage contract terms. JA 230-31.

The settlement agreement did not permit class members to opt out, which is of critical concern to petitioners here, who had earlier filed suit against respondent Mellon in federal court in Virginia, alleging that its escrow practices violated federal and Virginia law. *Crehan, et al. v. Mellon Mortgage Co.*, No. 93-1017-A (E.D. Va. 1993), Eighth

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[1] The settlement also requires that Mellon automatically refund certain excess reserves, JA 230, rather than give customers the choice between an automatic refund or a credit to their account. Automatic refunding cannot be considered a material part of the settlement because it was Mellon's standard practice for a year prior to settlement, Pet. App. 12a, and is mandatory under federal regulations effective May 24, 1995. 24 C.F.R. § 3500.17(f)(2). Any claims by class members relating to Mellon's prior failure to refund excess escrow amounts automatically are essentially claims for past money damages.

Circuit Supplemental Appendix ("SA") 117-30. Although that suit was dismissed on the ground that petitioners did not state a federal cause of action, SA 128, the dismissal was without prejudice to reinstituting suit on the state claims in state court. SA 130.[2] The settlement agreement, however, specifically mentions petitioners' Virginia suit by name, JA 245, and purports to extinguish it, thus barring petitioners from pursuing their own litigation.

4. Decisions Below.

On May 23, 1994, the district court held a five-minute fairness hearing. JA 9-15. Petitioners Michael and Suzanne Crehan did not personally travel to Minnesota, but filed a written request to opt out of the settlement so that they could pursue their Virginia litigation and also objected to the settlement's unfairness. JA 25-48. Several other class members requested exclusion from the class and/or submitted objections. JA 49-64. Nevertheless, in a brief opinion entered on June 15, 1994, the district court approved certification of the class, the fairness of the settlement, and the award of attorneys' fees. Pet. App. 14a-19a. Although the final order did not state under which subsection of Rule 23 certification was granted, the preliminary order, which permitted the notice of the proposed settlement to be sent to the class members, indicated that certification was sought only under Rules 23(b)(1) and (b)(2). JA 250.

The Eighth Circuit affirmed the approval of the settlement and the non-opt-out class certification. As to class certification, the court held that Rule 23(a)'s requirements

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[2] The Fourth Circuit summarily affirmed the dismissal. *Crehan, et al. v. Mellon Mortgage Co.*, 42 F.3d 1385 (4th Cir. 1994) (table).

had been met. It brushed aside concerns about commonality and typicality by finding that "all members of the class are interested in a satisfactory common course of conduct in the future servicing of their loans, despite the fact that some class members have different mortgage contracts." Pet. App. 5a. The court of appeals thus ignored the significant difficulties of certifying a class that fails to distinguish among differently situated class members (*e.g.*, those with Fannie Mae mortgages versus those with FHA/VA mortgages). Furthermore, the Eighth Circuit overlooked the thousands of class members who are *former* customers of Mellon—such as petitioners—and thus have no interest (common or otherwise) in Mellon's *future* escrow practices.

Turning to Rule 23(b), the court of appeals proceeded from the premise that "[w]hen either subsection (b)(1) or (b)(2) is applicable . . . (b)(3) should not be used." Pet. App. 6a. According to the court, because the complaint had sought injunctive relief, whether or not it also sought damages, certification under Rule 23(b)(2) was appropriate: "The fact that [damages were] sought incidentally to the prayer for injunctive relief does not affect this result." Pet. App. 7a. Asserting that the interests in judicial economy, efficiency, and mass resolution of small claims outweigh any potential unfairness to petitioners, the court of appeals disposed of all Rule-based arguments concerning the need for a 23(b)(3) opt-out class. Pet. App. 7a.

Proceeding to the constitutional issue, the Eighth Circuit held that "we are not presented with any due process problems in the composition of a mandatory class," despite the fact that absent class members were denied the right to opt out from a settlement involving money damages that extinguished private contractual arrangements. Pet. App. 7a.

In considering whether this Court's decision in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), guaranteed petitioners a right to opt out, the Eighth Circuit held that, despite their request to opt out, petitioners had objected to the settlement and thus "ha[d] waived any potential due process requirement that would allow them to pursue their claims again in another forum." Pet. App. 8a.

Finally, although acknowledging a dearth of factual findings by the district court, Pet. App. 10a, the court of appeals affirmed the approval of the settlement. It found that an automatic refunding procedure that Mellon had instituted more than a year prior to the settlement, and which is required by federal regulations in effect at the time of the court of appeals' decision, to be the primary benefit secured by the settlement. Pet. App. 12a-13a; *see supra* note 1.

REASONS FOR GRANTING THE WRIT

The Court Of Appeals' Decision Denying Petitioners The Right To Opt-Out To Pursue Their Claims For Money Damages Is In Conflict With Decisions Of Other Courts Of Appeals And Of This Court

In *Ticor Title Ins. Co. v. Brown*, 114 S. Ct. 1359 (1994) (per curiam), this Court granted certiorari to decide whether, in a federal class action, "absent class members have a constitutional due process right to opt out of any class action which asserts monetary claims on their behalf." *Id.* at 1361. After briefing and oral argument on the merits, the Court dismissed the writ as improvidently granted, principally on the ground that the constitutional question should not be reached if, under the Federal Rules of Civil Procedure, class actions seeking monetary damages may be

certified only under Rule 23(b)(3), which itself guarantees absent class members the right to opt out. *Id.*; *see generally Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176-77 (1974). Because there was a "substantial possibility" that Rule 23(b)(3) did provide such a right, *Ticor*, 114 S. Ct. at 1361, the Court decided that issuing a constitutional ruling would run counter to the established practice of deciding potentially dispositive non-constitutional questions prior to considering a constitutional issue, *id.*, and might result in "a constitutional rule that is good for no other federal class action." *Id.* at 1362.[3]

Thus, this case presents an ideal vehicle for considering both issues raised in *Ticor*, and for doing so in accordance with this Court's time-honored practice of addressing non-constitutional issues prior to constitutional issues. *See Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99 (1981); *Califano v. Yamasaki*, 442 U.S. 682, 692-93 (1979).

1. Rule 23.

Under the certification procedure of Federal Rule of Civil Procedure 23, all classes must meet the numerosity, commonality, typicality, and adequacy of representation prerequisites of Rule 23(a). In addition, the class must meet the requirements of at least one subsection of Rule 23(b), with subsection (b)(3) providing substantially more protection to absent class members than (b)(1) or (b)(2). Under the latter subsections—which apply principally to cases seeking

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[3] The question whether Rule 23 provided the absent class members in *Ticor* a right to opt out had been resolved adversely to the class in a prior unreported decision of the Third Circuit, and was not presented by the respondents in this Court or in the courts below. 114 S. Ct. at 1361-62.

injunctive or other forms of equitable relief—class members are not entitled to individual notice and an opportunity to opt out. *See Ticor*, 114 S. Ct. at 1361.

Certification under Rule 23(b)(3) is available in cases seeking monetary relief where a class action would save time, effort, and money, and would promote uniformity. *Rules Advisory Committee Notes to 1966 Amendments to Rule 23*, 39 F.R.D. 69, 102-03 (1966). However, because class actions for damages under subsection (b)(3) are likely to present differences among class members who might want to control their own litigation, in any class action maintained under subsection (b)(3), individual notice must be sent to all class members who can be identified with reasonable effort. The notice must advise them that they have the right to exclude themselves—or to opt out—from the action, as well as to intervene or otherwise participate in the litigation. *See* Fed. R. Civ. P. 23(c)(2). Accordingly, subdivision (b)(3) remains most faithful to the traditional rule that a person must be a party in order to be bound by a judgment. *See generally Martin v. Wilks*, 490 U.S. 755, 761-62 (1989); *see also Rules Advisory Committee Notes*, 39 F.R.D. at 106-07 ("[N]otice must be ordered, and is not merely discretionary, to give the members in a subdivision (b)(3) class action an opportunity to secure exclusion from the class. This mandatory notice . . . is designed to fulfill requirements of due process to which the class action procedure is of course subject." (*citing, e.g., Hansberry v. Lee*, 311 U.S. 32 (1940)); *Eisen*, 417 U.S. at 173-76 (similar). The quintessential Rule 23(b)(3) class action is one in which the class members seek money damages. *See, e.g., Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980).

The court of appeals here did not dispute that the class action complaint and settlement concerned substantial claims for monetary damages. Rather, the court simply held that, where certification is appropriate under subsection (b)(3) or subsection (b)(2)—the subdivision concerning claims involving injunctive and declaratory relief—it is preferable to certify the case under subsection (b)(2). Pet. App. 7a-8a.

This holding stands in stark contrast to the rulings of other courts of appeals. For instance, in *Holmes v. Continental Can Co.*, 706 F.2d 1144 (11th Cir. 1983), the court certified a class action pursuant to Rule 23(b)(2). *Id.* at 1152. However, the court recognized that opt-out rights must be accorded with respect to the class members' monetary claims, even though they had no opt-out rights with respect to injunctive and declaratory relief. *Id.* at 1156-57. Similarly, in the Ninth Circuit, in cases where certification under (b)(2) is appropriate with respect to injunctive relief, the damages aspects are certified pursuant to Rule 23(b)(3) to protect opt-out rights. *See Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 634-35 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217 (1983); *Society for Individual Rights, Inc. v. Hampton*, 528 F.2d 905, 906 (9th Cir. 1975).[4]

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[4] In the past, the Ninth Circuit has upheld exclusive (b)(2) certification where claims for monetary relief were joined with claims for injunctive relief, but has done so only where the money remedy was "incident to" and did not "predominate" over the claims for injunctive relief. *See, e.g., Elliott v. Weinberger*, 564 F.2d 1219, 1228 (9th Cir. 1977), *modified on other grounds sub nom., Califano v. Yamasaki*, 442 U.S. 682 (1979). These decisions were issued prior to the Ninth Circuit's ruling in *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386 (9th Cir. 1992), discussed *infra* at 1-2, 10-11, 17-18, which held that due process requires

(continued...)

Similarly, in *Penson v. Terminal Transport Co.*, 634 F.2d 989 (5th Cir. 1981), the Fifth Circuit recognized the importance of class members' retaining individual control over their money damages claims, and thus allowed class members to opt out in a Rule 23(b)(2) class action. *Id.* at 994. When individual monetary relief is sought, the court stated, the case "begins to resemble a 23(b)(3) action and there has been more concern [there] with protecting the due process rights of the individual class members . . . ." *See also Bogard v. Cook*, 586 F.2d 399, 409 (5th Cir. 1978), *cert. denied*, 444 U.S. 883 (1979); *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 559, 565 (2d Cir. 1968).[5]

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[4](...continued)
that class members with damages claims be afforded the opportunity to opt out. In any event, these earlier cases tend to be civil rights actions in which the homogeneity of the class and the nature of the relief sought—back pay—have been found to justify (b)(2) treatment. *See, e.g., Probe v. State Teachers' Retirement Sys.*, 780 F.2d 776, 780 (9th Cir.), *cert. denied*, 476 U.S. 1170 (1986); *see also Wetzel v. Liberty Mutual Ins. Co.*, 508 F.2d 239, 252-57 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975) (identifying need for judicial economy, consistency of result and effective binding nature of adjudication in civil rights action for "group" injuries); *Robinson v. Union Carbide Corp.*, 544 F.2d 1258, 1259-60 (5th Cir.)(same), *cert. denied*, 434 U.S. 822 (1977).

[5] The Eighth Circuit's view is also inconsistent with that of the leading class action treatise, which maintains that, where both damages and injunctive relief are present and there is a question as to which type predominates, the district court should protect absent class members by, for example, certifying the damages portion of the class under Rule 23(b)(3) or by certifying the injunctive portion alone, leaving the damages for individual determination. 1 *Newberg on Class Actions* § 4.14, at 4-51 - 4-52 (3d ed. 1992).

In this case, there was no legitimate basis for exclusive Rule 23(b)(2) certification. First, the predominant claim for relief, and certainly the predominant feature of the settlement, was resolution of the class members' individual money damages claims. Thus, the settlement has a *res judicata* effect not only as to the highly individualized claims concerning excess escrow retention (which differed based on mortgage contract type, amount of time the mortgage was held, and applicable state and federal law, among other things), but also claims that could have been asserted in the litigation, such as those made by petitioners for special compensatory damages and punitive damages. SA 123-26 (describing petitioners' fraud claims).

More importantly, the "injunctive relief" contained in the settlement does not stop Mellon from doing anything. Rather, it *permits* Mellon to choose among three methods of escrow retention, one of which is based on the interpretation of applicable law most favorable to Mellon, going so far as to reform the class members' contracts to allow Mellon to demand greater escrow payments than it could have at the inception of the suit. Settlement Agreement at ¶ 10, JA 229-32.

Second, the class consists of a large and identifiable subset of *former* Mellon customers who have no legitimate claim for injunctive relief. For *former* customers, their only conceivable claim is for monetary damages. The actual rebate portion of the settlement was so small that for many of them the cost of a postage stamp for mailing the claim form would exceed the amount of their rebate. With respect to these former customers, the Eighth Circuit's ruling is flatly contradicted by the language of Rule 23(b)(2) itself—which is limited to claims for "final injunctive . . . or

corresponding declaratory relief"—and is irreconcilable with the rulings of other circuits discussed above.

Third, even assuming that Mellon's "agreement" to obey the law could somehow be construed as injunctive relief, under precedents from the Fifth, Ninth, and Eleventh Circuits, a Rule 23(b)(2) certification should not be permitted to override petitioners' opt-out rights with respect to their damages claims. But, if as respondents maintain and the Eighth Circuit held, exclusive certification of this case under Rule 23(b)(2) is supportable simply because it is more "efficient" than allowing the opt-out rights accorded under subsection (b)(3), Rule 23(b)(2) would be available in virtually all class actions in which any request for "injunctive relief" is included, thereby obliterating the carefully constructed differences among the sub-parts of Rule 23.

For these reasons, the ruling below is at odds with the holdings of other courts of appeals which have properly considered the structure of the Rule and have recognized that sweeping interpretations of the other subsections of Rule 23(b) would negate the important protections for individual class members under Rule 23(b)(3). *See In re Dennis Greenman Securities Litig.*, 829 F.2d 1539, 1545 (11th Cir. 1987) ("[I]f compensatory damages actions can be certified under Rule 23(b)(1)(A), then all actions could be certified under the section, thereby making the other sub-sections of Rule 23 meaningless, particularly Rule 23(b)(3)."); *McDonnell Douglas Corp. v. United States District Court*, 523 F.2d 1083, 1086 (9th Cir. 1975) (expansive interpretation of Rule 23(b)(1)(A) would render Rule 23(b)(3) "superfluous"), *cert. denied*, 425 U.S. 911 (1976). Indeed, unrestrained certification under the other subdivisions of Rule 23(b) is at odds with the Court's analysis in *Eisen*, which,

despite its assumption that the case was properly certified under subdivision (b)(3), stressed the importance of Rule 23(b)(3)'s structural protections of individual rights. 417 U.S. at 173, 176-77.

2. Due Process.

The court of appeals' decision upholding the mandatory class action settlement—and, thus, denying petitioners' right to opt out on their claims for money damages—is also in conflict with the decision of the court of appeals in *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386 (9th Cir. 1992), *writ dismissed as improvidently granted*, 114 S. Ct. 1359 (1994). There, the Ninth Circuit held that, where substantial claims for monetary damages are involved, despite the presence of a claim for injunctive relief, absent class members must, under the Fifth Amendment's Due Process Clause, be given the right to opt out and to pursue their money damages claims. *Id.* at 392.

In *Ticor*, the Ninth Circuit lifted a district court injunction against the prosecution by a class of Arizonans of claims for antitrust damages. It did so despite the fact that a prior nationwide settlement, which had been upheld by the Third Circuit, purported to release all of their money damages claims against the defendant. 982 F.2d at 388-89. Because that settlement—like the settlement in this case—did not contain an opt-out right, *Ticor* held that, as a matter of due process, the Arizona plaintiffs were not bound by the judgment and were free to pursue a subsequent lawsuit against the defendants in a forum of their choosing. *Id.* at 392. In so holding, the Ninth Circuit relied on this Court's decision in *Shutts*, 472 U.S. at 812-14, which held that, in order for a class action judgment to have binding effect, absent class members must be given notice and an

opportunity to opt out, at least in class actions "wholly or predominately for money judgments." *Id.* at 811 n.3; *see also In re Real Estate Title & Settlement Servs. Antitrust Litig.*, 869 F.2d 760, 769 (3d Cir.) (under *Shutts*, plaintiffs not precluded from bringing state court damages suit, despite earlier class action settlement purporting to extinguish their rights, because settlement did not afford class members right to opt out) (involving same underlying antitrust claims presented in *Ticor*), *cert. denied*, 493 U.S. 821 (1989).

This Court granted review in *Ticor* to determine whether the Ninth Circuit was correct in holding that the right to opt out obtains, as a matter of due process, in every class action in which substantial money damages are sought. Although, for the reasons explained above, this Court later dismissed the writ as improvidently granted, if the Court resolves the Rule 23 question against petitioners, this case squarely presents the constitutional question on which review was granted in *Ticor*. *See Ticor*, 114 S. Ct. at 1362-64 (O'Connor, J., with whom Rehnquist, C.J., and Kennedy, J., join, dissenting).

The Eighth Circuit avoided addressing whether *Shutts* applies to all cases in which substantial monetary damages are sought by relying on its prior decision in *White v. National Football League*, 41 F.3d 402, 407-08 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 2569 (1995), holding that petitioners had "consented" to the personal jurisdiction of the district court because they "appeared" there, not only to challenge the lack of opt-out rights, but to object to the fairness of the settlement. *See* Pet. App. 9a-11a. The Eighth Circuit's reasoning misses the mark for at least four reasons.

First, its analysis is at odds with the structure of the Federal Rules, which permits a party to challenge personal jurisdiction under Rule 12(b)(2) at the outset of the case and also to participate fully in all aspects of the merits of the litigation if the challenge to personal jurisdiction is rebuffed, without waiving the personal jurisdiction challenge. *See* 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1351, at 261 (2d ed. 1990) ("A party who has unsuccessfully raised an objection [to personal jurisdiction] under Rule 12(b)(2) may proceed to trial on the merits without waiving the challenge"). Similarly here, petitioners sought the right to opt out in order to pursue their Virginia litigation, but alternatively challenged the settlement on its merits. In short, the court of appeals' rejection of petitioners' constitutional right to opt out is predicated on the need for a "special appearance" to challenge jurisdiction, which has been abolished under the Federal Rules. *See id.* § 1362, at 450-51.[6]

Second, the court of appeals' ruling encourages collateral attacks and multiple litigation. As illustrated by practice under Rule 12(b)(2), the Eighth Circuit's rule would create a Hobson's choice for absent class members in petitioners' position between asserting *only* their rights to opt out by collateral attack, *or* challenging *only* the merits of the settlement in the initial court, often a distant forum.

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[6] *But cf. In re Real Estate*, 869 F.2d at 769 (indicating in dicta that if absent class members had litigated merits of settlement, rather than merely attempting to extricate themselves from court's jurisdiction through an opt-out motion, they could not collaterally attack settlement in separate proceeding).

Third, petitioners' "appearance" in the district court in Minnesota can hardly be construed as consent to the suit. Because of the inconvenience of the Minnesota forum, they filed written objections in which they claimed that they had a right to opt out—a right which would have preserved their ability to maintain their suit against respondent in their home state of Virginia, but which the settlement agreement specifically purported to abrogate. JA 25-48. Petitioners also objected to the fairness of the settlement on various grounds, not wanting to be deemed to have waived any such objections if their opt-out rights were denied.

Finally, the Eighth Circuit's decision is at odds with this Court's ruling in *Shutts*. To be sure, the initial discussion in *Shutts* of the due process rights of absent class members is cast in "personal jurisdiction" terms. Thus, the Court held that "minimum contacts" of the type necessary to bind defendants are not necessary to bind absent plaintiffs. *Shutts*, 472 U.S. at 808-10. Thereafter, however, in constructing the appropriate standards for binding absent class members in money damages cases, the Court held that, "at a minimum," *all* absent class members must be given notice and an opportunity to opt out. *Id.* at 812. The Court stated that "a forum State may exercise jurisdiction over the claim of an absent class-action plaintiff, even though that plaintiff may not possess the minimum contacts with the forum which would support personal jurisdiction over a defendant. . . [,]" but then set forth the minimum due process protections that must be afforded to "absent plaintiff[s] concerning a claim for money damages or similar relief at law. . . ." *Id.* at 811-12 (footnote omitted).

The teaching of *Shutts*, if not its actual holding, is that, while minimum contacts are not necessary to bind absent

class members, minimal due process—notice, adequate representation, and an opportunity to opt out—must be accorded *all* absent class members, not just those lacking jurisdictional contacts, before it can be said that the absent class members have "consented" to be bound. Put differently, the "personal jurisdiction" strain of this Court's due process jurisprudence was relevant only to *Shutts*' decision concerning the potential geographical reach of a class action over absent class members (which the Court held to be nationwide). However, class members' property interest in their causes of action arises from another, related strain of this Court's due process jurisprudence, exemplified by cases such as *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 318-20 (1950) (cited in *Shutts*, 472 U.S. at 812), and *Mathews v. Eldridge*, 424 U.S. 319, 341-49 (1976). Under that aspect of due process, which undergirds the minimum due process guarantees set forth in *Shutts*, the existence of an opt-out right does not turn on whether the absent class members live in the forum state or a neighboring state or whether, as in petitioners' case, absent class members have asserted their opt-out rights and other objections in a written filing sent to the Clerk's Office.

Thus, the most reasonable reading of *Shutts* is that, because of the settlement's abrogation of opt-out rights here, neither petitioners nor any other of the absent class members consented to the jurisdiction of the district court or could otherwise be bound by its order.[7] Accordingly, not only

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[7] In this regard, the language of this Court's holding in *Shutts* describes the minimum due process protections for all absent class members and gives no indication that absent class members who had minimum contacts with Kansas (the forum state) could have

(continued...)

does this case present an opportunity to resolve the question before this Court in *Ticor*, but it will also clarify the precise contours of the due process rights enunciated in *Shutts*.

* * *

The pending petition in *Martin v. Drummond Company, Inc.*, 663 So.2d 937 (Ala. 1995), *petition for cert. filed*, 64 U.S.L.W. 378 (U.S. Oct. 3, 1995) (No. 95-548), a case arising from state court, presents the question whether the *Shutts* opt-out right applies to absent class members who have minimum contacts with the forum state. Plenary review should be granted here in lieu of, or in addition to, *Martin*, because this case presents the predicate question whether Rule 23 required that petitioners be afforded the right to opt out, which was of paramount concern to this Court in *Ticor*.

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[7](...continued)
been denied notice and an opportunity to opt out. *Shutts*, 472 U.S. at 812 (citations omitted).

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 20, 1996

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 94-2800

GRETCHEN DEBOER, AND ALL OTHERS SIMILARLY SITUATED,

Plaintiff/Appellee,

v.

MELLON MORTGAGE COMPANY, A TEXAS CORPORATION,

Defendant/Appellee.

MICHAEL THOMAS CREHAN; SUZANNE TETREAULT CREHAN,

Movants/Appellants.

Appeal from the United States District Court for the District of Minnesota.

Submitted: May 15, 1995

Filed: August 30, 1995

Before WOLLMAN and MORRIS SHEPPARD ARNOLD, Circuit Judges, and BOGUE,* Senior District Judge.

WOLLMAN, Circuit Judge.

*The HONORABLE ANDREW W. BOGUE, Senior United States District Judge for the District of South Dakota, sitting by designation.

Objectors Michael T. and Suzanne T. Crehan appeal the district court's[1] orders certifying a class and approving a settlement in Gretchen DeBoer's class action suit against Mellon Mortgage Company. We affirm.

I.

Mellon is one of the nation's largest servicers of mortgage loans. Although Mellon's escrow accounting practices have historically been accepted by the Department of Housing and Urban Development ("HUD"), they have been challenged in a number of suits as requiring too high an account balance. Escrow accounts typically are maintained to enable the servicer to pay taxes, insurance, and other expenses as they come due. When the loan servicer maintains excess cushion in an escrow account, the servicer essentially receives an interest-free loan from the customer on the excess amount. Maintaining some cushion, however, enables the servicer to pay off expenses as they accrue without dipping into corporate funds if the customer is delinquent in paying.

Mortgage servicers can account for escrow balances through either an aggregate or an individual-item analysis.[2] When aggregate accounting is used, the servicer estimates the balance for the whole account for the year, assuming that the borrower will make monthly payments equal to one-twelfth of the total disbursements. The monthly balances are then adjusted to reflect

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[1]The Honorable Diana E. Murphy, then Chief Judge, United States District Court for the District of Minnesota, now United States Circuit Judge for the United States Court of Appeals for the Eighth Circuit.

[2]HUD has recently approved a new rule, effective May 24, 1995, requiring the use of aggregate accounting analysis. 24 C.F.R. § 3500.17. This rule allows a three-year phase-in period for pre-existing accounts. *See* 24 C.F.R. §§ 33500.17(b), (c)(4)(i); 60 Fed. Reg. 8812, 8813 (1995).

a lowest monthly trial balance of zero, and the amount of the cushion is then added. 24 C.F.R. § 3500.17(d). When a servicer employs individual-item analysis for its escrow accounts, separate subaccounts are set up for each escrow item. Typically, these individual-item accounts generate more cushion than an aggregate account because the funds for one subaccount are unavailable to pay another subaccount as it comes due; thus requiring an adequate amount of cushion for each subaccount at all times. Neither the Federal National Mortgage Association ("FNMA") nor the Federal Housing Administration or Veterans Administration ("FHA/VA") mortgage forms disallows the use of individual-item analysis.

DeBoer filed her class action suit against Mellon in Minnesota state court in 1992, alleging a number of state law claims as well as a violation of section 10 of the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2609, which sets a ceiling on the amount of allowable cushion. The suit sought to enjoin Mellon "from requiring any mortgagor to establish or maintain in an escrow account an actual cushion in excess of the cushion authorized by the underlying mortgage contract or the RESPA ceiling, whichever is less." The suit also sought to force Mellon to adjust its escrow accounts to ensure compliance with that standard. In August 1993, the Crehans brought an independent suit against Mellon in the Eastern District of Virginia, asserting a claim under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968, as well as numerous state law claims.

Following removal of the class action to the federal district court in September 1992, DeBoer and Mellon began negotiations and eventually came to a proposed settlement. The settlement would allow Mellon to employ individual-item analysis accounting in determining an estimate of escrow amounts necessary to pay items as they come due, with accrual completed in the month prior to disbursement. Mellon is also authorized under the settlement to maintain the maximum cushion allowed by law, regardless of the

terms of a customer's mortgage instrument. The settlement requires Mellon to automatically refund excess escrow funds if they total more than $15, pay a class rebate for past charges, and pay $240,000 of the requested $290,000 in attorneys' fees. All individual suits against Mellon would be dismissed under the settlement, including any suit by the Crehans. Prior to the district court's approval of the settlement, the Crehans' Virginia action was dismissed for failing to state a federal cause of action, and during the pendency of this appeal that decision was affirmed by the Fourth Circuit in an unpublished opinion. *Crehan v. Mellon Mtge. Co.*, 42 F.3d 1385 (4th Cir. 1994) (table).

The settlement was submitted to the district court on October 27, 1993. Two days later the district court preliminarily certified the class for the purpose of the settlement and approved the notice of the settlement to be published to class members. On May 13, 1994, the district court held a hearing to consider objections. Five timely objections were filed out of an approximate class of 300,000, including the Crehans', and another six individuals timely noted their desire to be excluded from the class. On June 15, 1994, the settlement and attorneys' fees were approved, and on July 5, 1994, the Crehans were allowed to intervene for purposes of appealing the settlement. The Crehans challenge the substance of the settlement, the propriety of a class action to handle the claims against Mellon, their inability to opt-out of the class to pursue their individual claims, and several other points.

II.

A.

Management of class actions is governed by Rule 23 of the Federal Rules of Civil Procedure. The Crehans claim that the class fails to meet the certification prerequisites of Rule 23(a) because common questions of law or fact do not exist. The Crehans also claim that DeBoer does not present claims that are typical of the class and that DeBoer and class counsel have provided woefully inadequate representation of the class.

Commonality is not required on every question raised in a class action. Rather, Rule 23 is satisfied when the legal question "'linking the class members is substantially related to the resolution of the litigation.'" *Paxton v. Union Nat'l Bank*, 688 F.2d 552, 561 (8th Cir. 1982) (quoting *American Fin. Sys., Inc. v. Harlow*, 65 F.R.D. 94, 107 (D. Md. 1974)), *cert. denied*, 460 U.S. 1083 (1983). The Crehans claim that the differing types of mortgage contracts give rise to different claims that call for different treatment through subclasses. The fact that individuals with different mortgage forms will have RESPA or contract claims of differing strengths does not impact on the commonality of the class as structured, however. *See Forbush v. J.C. Penny Co.*, 994 F.2d 1101, 1106 (5th Cir. 1993) (commonality and typicality satisfied in challenge to pension calculations despite presence of four different pension plans). The main point of contention centers on Mellon's alleged over-escrowing of funds, and all members of the class are interested in a satisfactory common course of conduct in the future servicing of their loans, despite the fact that some class members have different mortgage contracts. This declaratory and injunctive nexus is sufficient to establish the requisite commonality. *See Paxton*, 688 F.2d at 561. Other class actions have also been maintained on similar bases. *See, e.g., GMAC Mtge. Corp. of Pa. v. Stapleton*, 603 N.E.2d 767 (Ill. App. 1992), *appeal denied*, 610 N.E.2d 1262 (Ill. 1993). Nor does the nature of the proposed settlement alter this inquiry. *In re GMAC Fuel Tank Liability*, 55 F.3d 768, 795-96 (3d Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3017 (Jun. 28, 1995) (No. 94-2137).

Similarly, Rule 23(a)'s typicality requirement is satisfied. The burden of demonstrating typicality is fairly easily met so long as other class members have claims similar to the named plaintiff. *Paxton*, 688 F.2d at 562. DeBoer's claims are typical of the remainder of the class given the nature of the injunctive relief sought. *See Forbush*, 994 F.2d at 1106. This typicality is not altered by the different mortgage instruments held by class

members. The relief sought in the action is the same regardless of the amount of overage in any particular account. *See Donaldson v. Pillsbury Co.*, 554 F.2d 825, 831 (8th Cir.) ("When the claim arises out of the same legal or remedial theory, the presence of factual variations is normally not sufficient to preclude class action treatment."), *cert. denied*, 434 U.S. 856 (1977); *see also Robidoux v. Celani*, 987 F.2d 931, 936-37 (2d Cir. 1993) (typicality met despite varying fact patterns).

DeBoer and class counsel also appear to have fairly and adequately represented the class. There is no indication that DeBoer's interest was antagonistic to the remainder of the class or that the claims were not vigorously pursued. *See Paxton*, 688 F.2d at 562-63. The fact that the Crehans do not approve of the settlement terms does not, of itself, demonstrate that DeBoer and class counsel provided inadequate representation. To hold as much would require decertification any time an objection is raised to a class, certainly not the standard envisioned by Rule 23. "The adequacy of class representation . . . is ultimately determined by the settlement itself." *White v. National Football League*, 41 F.3d 402, 408 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 2569 (1995). In sum, the district court did not abuse its discretion in finding Rule 23(a)'s certification prerequisites satisfied. *See Wright v. Stone Container Corp.*, 524 F.2d 1058, 1061 (8th Cir. 1975).

B.

The district court found the class properly certifiable under either Rule 23(b)(1) or (b)(2). The Crehans assert that certification of any class should have been under section (b)(3) so that the class members could opt-out of the settlement and pursue their claims individually. When either subsection (b)(1) or (b)(2) is applicable, however, (b)(3) should not be used, so as to avoid unnecessary inconsistencies and compromises in future litigation. *See Reynolds v. National Football League*, 584 F.2d 280, 284 (8th Cir. 1978) (discussing (b)(1)); 7A Charles A. Wright et al., Federal Practice and Procedure § 1772, at 425 (1986) (discussing (b)(1)); *id.* § 1775, at 491 (discussing (b)(2)); *id.* § 1777, at 521 (noting that

"the privilege to opt-out of the action should be operable only when the class action is maintainable under [Rule 23(b)(3)] alone").

Certification is appropriate under subsection (b)(2) if class-wide injunctive relief is sought when the defendant "has acted or refused to act on grounds generally applicable to the class." Fed. R. Civ. P. 23(b)(2). In this case, the class sought such injunctive relief against Mellon's alleged over-escrowing practices. Therefore, certification under section (b)(2) was appropriate. *See* 7A Wright, et al., *supra*, § 1775, at 470 ("If the Rule 23(a) prerequisites have been met and injunctive or declaratory relief has been requested, the action usually should be allowed to proceed under subdivision (b)(2)."). "The fact that [damages were] sought incidentally to the prayer for injunctive relief does not affect this result." *Paxton*, 688 F.2d at 563. Any potential unfairness to the Crehans in compromising their claims is "outweighed by the purposes behind class actions: eliminating the possibility of repetitious litigation and providing small claimants with a means of obtaining redress for claims too small to justify individual litigation." *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 249 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975). Because we find the class properly certifiable under section (b)(2) we need not address the applicability of section (b)(1).

Contrary to the Crehans' contentions, we are not presented with any due process problems in the composition of a mandatory class. In *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 & n.3 (1985), the Supreme Court left open the question whether an absent class member in a suit for equitable relief could be precluded from seeking additional avenues of relief. When an objector submits to the court's jurisdiction, however, the *Shutts* dilemma is avoided. *White*, 41 F.3d at 407-08. Nor must we today decide the question whether a suit seeking equity can bind a putative class member, thus preventing a subsequent suit for damages, *compare In re Colt Indus. Shareholders' Litig.*, 566

N.E.2d 1160, 1167 (N.Y. 1991) (finding that due process precludes extinguishing the rights of an absent plaintiff to bring an action in damages in another jurisdiction) *with Grimes v. Vitalink Comm. Corp.*, 17 F.3d 1553, 1560 n.8 (3d Cir.) (concluding that due process protections "bind absent class members who had sufficient minimum contacts with the forum" even in the absence of an opt-out provision), *cert. denied*, 115 S. Ct. 480 (1994), because the Crehans are not absent plaintiffs in this action.

In response to the notice of the proposed settlement, the Crehans noted their objections to being included within the settlement class, but they also took issue with the terms of the settlement. By submitting extensive memoranda to the district court on the issues of the fairness of the settlement, and again reaffirming their position to us on appeal, the Crehans have waived any potential due process requirement that would allow them to pursue their claims again in another forum. *White*, 41 F.3d at 407-08. *Cf. In re Real Estate Title and Settlement Servs. Antitrust Litig.*, 869 F.2d 760, 770-71 (3d Cir. 1989) (appearance to merely contest inclusion in class insufficient to waive personal jurisdiction complaint), *cert. denied*, 493 U.S. 821 (1989). The release entered into on their behalf[3] is thereby consistent with due process. *See Grimes*, 17 F.3d at 1564 (permissible for the class settlement to preclude later actions relying on different legal theories when those claims arise out of the same operative facts as presented in the settlement); *see also Shutts*, 472 U.S. 808-12 (discussing the inherent due process protections in class action procedures, and the attendant lesser need for external protections of class plaintiffs). Essentially, the Crehans have had their day in court to point out the shortcomings of Mellon's practices and of the settlement on the merits, precisely what they requested in their

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[3]The release language is intended to prevent further litigation against Mellon on this matter and specifically mentions the Crehans' earlier-pending Fourth Circuit litigation.

briefs to this court. *See Trans World Airlines, Inc. v. Mattox*, 897 F.2d 773, 787 (5th Cir.) (jurisdictional objection waived when arguments go "to the heart of the issue before the district court"), *cert. denied*, 498 U.S. 926 (1990).

The Crehans also challenge the sufficiency of the notice of the proposed settlement. Notice of a settlement proposal need only be as directed by the district court, Fed. R. Civ. P. 23(e), and reasonable enough to satisfy due process. *See Grunin v. International House of Pancakes*, 513 F.2d 114, 120-22 (8th Cir.), *cert. denied*, 423 U.S. 864 (1975). Each class member was notified by mail and notice was also printed in a national publication. Although neither extensive nor remarkably thorough, we find the notice sufficient to comply with the strictures of due process. *See Reynolds*, 584 F.2d at 285; *see also Maher v. Zapata Corp.*, 714 F.2d 436, 452 (5th Cir. 1983) (notice "is not required to provide a complete source of settlement information"). The class received due notice of the proceeding and settlement proposal, and the Crehans were able to vigorously argue their position in their objections to the district court. "Due Process requires no more." *Reynolds*, 584 F.2d at 285.

Nor did the district court abuse its discretion in limiting the Crehans' intervention to an appeal of the settlement. The timing of the motion, coupled with the court's earlier findings as to the reasonableness of the settlement, serves to validate the court's ruling. *See White v. National Football League*, 822 F. Supp. 1389, 1432 (D. Minn. 1993), *aff'd*, 41 F.3d 402 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 2569 (1995).

III.

"In approving a class settlement, the district court must consider whether it is 'fair, reasonable, and adequate.'" *Van Horn v. Trickey*, 840 F.2d 604, 607 (8th Cir. 1988) (quoting *Grunin*, 513 F.2d at 123). The district court's assessment as to the reasonableness of a settlement "will not be overturned unless the party challenging the settlement clearly shows that the district court

abused its discretion." *Id.* at 607; *see Wiener v. Roth*, 791 F.2d 661, 662 (8th Cir. 1986) (per curiam). The district court noted the Crehans' objections, but issued cursory findings as to the fairness of the settlement. Although the district court's lack of more extensive findings is somewhat troubling, the Crehans do not strenuously complain about this fact because they assert that on its face the settlement is so lacking in value to the class that reversal is mandated. In the absence of specific findings regarding the fairness of the settlement, we must assume that the district court did not abuse its discretion unless the record establishes the contrary. *See Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 437 (1968) (remand not necessary where "the record contain[s] adequate facts to support the decision of the trial court to approve the proposed compromises"). *Accord In re Flight Transp. Corp. Sec. Litig.*, 730 F.2d 1128, 1136 (1984), *cert. denied*, 469 U.S. 1207 (1985). In such cases we should reverse the district court only if there is no basis upon which it could have found that the settlement is a reasonable one or if the settlement is improper as a matter of law.

Counseling strongly in favor of the settlement is the fact that the plaintiffs did not have a very strong case — they may not have even had a legitimate federal cause of action. The Circuits are split on the issue of whether section 10 of RESPA creates a private right of action. *See State of Louisiana v. Litton Mtge. Co.*, 50 F.3d 1298, 1301-02 (5th Cir. 1995) (no cause of action); *Allison v. Liberty Savings*, 695 F.2d 1086 (7th Cir. 1982) (same). *But see Vega v. First Fed. Savings & Loan Ass'n of Detroit*, 622 F.2d 918, 925 n.8 (6th Cir. 1980). We need not decide whether such an action lies for purposes of this appeal, but we do note that the district court in this instance dismissed a case for precisely this reason during this same time frame, *Michels v. Resolution Trust Corp.*, Civ. No. 4-93-1167 (D. Minn. April 13, 1994), and that a number of other district courts have also found no viable cause of action. *See Litton Mtge.*, 50 F.3d at 1301-02 n.14 (citing cases).

In light of this fact, there was a strong unlikelihood of success, or, at best, a certainty of initial defeat followed by another round at the appellate level. Accordingly, virtually any benefit inuring to the class would be better than the prospect of an ultimately unsuccessful litigation.

The Crehans claim that because the Sixth Circuit in *Vega* is the only Circuit to have found a private cause of action under Section 10, class counsel was per se inadequate for failing to bring the case in that Circuit. We decline to accept the invitation to hold that forum shopping in an unsettled area of the law is an essential element of adequate representation. The summary affirmance of the dismissal of the Crehan's individual claims in the Fourth Circuit is an indication of the faint chance of success that existed with respect to the RICO and damage claims that the Crehans wish had been asserted. The other claims relating to individual-item analysis accounting faced a similarly difficult road given HUD's past acceptance of Mellon's escrow accounting practices. *See Stapleton*, 603 N.E.2d at 774. The problems relating to the merits of the plaintiffs' claims strongly favor the settlement. *See City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 (2d Cir. 1974) (adequacy of settlement must be measured against "the strength of the case presented by the plaintiffs").

The Crehans claim that the class suit was based primarily on the desire to recover money damages and that the injunctive relief was unnecessary because the automatic refunding procedure to which Mellon agreed was already in place. Thus, according to the Crehans, the settlement is basically a sham that gives class counsel an undeserved windfall and the class plaintiffs nothing but a paltry sum in damages. Mellon and class counsel counter that the mandatory automatic refund procedure provides the major benefit to the class and will result in consumer savings in the millions of dollars. Mandatory automatic refunding is consistent with the injunctive relief sought in the initial complaint and settlement negotiations. The practice of automatically refunding escrow

overages has historically been inconsistently followed by Mellon;[4] thus, requiring Mellon to hew to this procedure should provide some benefit to the class.

The Crehans claim further that the automatic refund provision is offset by the fact that Mellon can now hold higher balances in escrow; they also assert that prior to the settlement no account reserve was allowed for FNMA customers, whereas under the settlement Mellon may retain reserves. Interpretation of the contractual obligations is not so cut and dried as the Crehans would have us believe, *see Stapleton*, 603 N.E.2d at 774; *Attorney General v. Michigan Nat'l Bank*, 325 N.W.2d 777 (Mich. 1982), and the FNMA form does not require the automatic refunding that is now available to the class. Further, it is the time value of the refund we must consider against the time value of any potential additional escrow balance, not the dollar amount held in the account in absolute terms. The settlement does not allow Mellon to increase anyone's loan obligation.

"'The very purpose of compromise is to avoid the delay and expense of . . . a trial.'" *Grunin*, 513 F.2d at 124 (quoting *Young v. Katz*, 447 F.2d 431, 433 (3d Cir. 1971)). Accordingly, while it is incumbent on the district court to determine the propriety of the settlement, it need not resolve all of the underlying disputes, *see id.* at 123, and the value of the settlement need not be determined with absolute precision. Additionally, the potential drain on the resources of both parties in discovery relating to Mellon's escrow records to verify its treatment of all its accounts provides an incentive to settlement. The parties to a class action are not required to incur immense expense before settling as a means to justify that settlement.

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[4]Mellon had engaged in such automatic refunding prior to 1990. This practice was eliminated from 1990 until 1992 and was re-initiated following the filing of this suit.

The views of the parties to the settlement must also be considered. As noted by the district court, class counsel is experienced in this type of litigation. *See Armstrong v. Board of Sch. Dirs. of Milwaukee*, 616 F.2d 305, 325 (7th Cir. 1980) (noting that the views of counsel are to be accorded deference). The fact that only a handful of class members objected to the settlement similarly weighs in its favor. *See Reynolds*, 584 F.2d at 287; *see also Grant v. Bethlehem Steel Corp.*, 823 F.2d 20, 23-24 (2d Cir. 1987) (district court has a duty to the silent majority as well as the vocal minority). Having adduced no evidence of collusion other than their complaints as to the settlement terms, the Crehans have failed to raise an inference of bad faith in the negotiation process. It also warrants mention that a Magistrate Judge[5] presided over the settlement negotiations and that the district court had prior experience with this type of litigation. Such multiple layers of scrutiny further militate in favor of the settlement and against the Crehans' claims of collusion.

The award of attorneys' fees likewise does not constitute an abuse of discretion. The vast majority of the fee will be paid by Mellon and will not come out of any class recovery. The continuing nature of a permanent refunding procedure constitutes a benefit to the class adequate to justify the fee award.

The judgment is affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

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[5]The Honorable Jonathan Lebedoff, United States Magistrate Judge for the District of Minnesota.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

GRETCHEN DEBOER,
AND ALL OTHERS
SIMILARLY SITUATED,

Plaintiff,

Court File No. 4-92-CV-8222

FINDINGS AND ORDER

vs.

MELLON MORTGAGE
COMPANY

Defendant.

This matter came on for hearing before the undersigned on Friday, May 13, 1994 on the motion of Plaintiffs for final approval of the class action settlement-entered into between the parties to the action. Defendant appeared in support of said motion.

The Plaintiff class was represented by Charles S. Zimmerman and Barry G. Reed of the law firm Zimmerman Reed. Defendant was represented by Michael J. Bleck and Mary E. Senkus of the law firm of Oppenheimer Wolff & Donnelly, 3400 Plaza VII, 45 South Seventh Street, Minneapolis, Minnesota 55402. The issues with respect to the fairness of the proposed settlement and the attorneys' fees and costs sought by Plaintiffs' counsel were briefed and argued. Based upon such briefs and arguments, and upon the other files and records in this matter, the Court finds and orders as follows:

1. This action was commenced against Defendant in the District Court, County of Hennepin, State of Minnesota on August 3, 1992.

2. The claims asserted by Plaintiffs consist of one cause of action under Section 10 of the Real Estate Settlement Procedures Acct ("RESPA"), and three causes of action asserting remedies under state common law.

3. The matter was subsequently removed to this Court on the petition of Defendant.

4. This action may for all purposes be maintained as a class action with the class consisting of all persons who have or had escrowed mortgage loans that were serviced or subserviced by Defendant at any time from January 1, 1990 up to and including June 30, 1993 (the "Class Period"). This class includes subclasses of (a) all persons who have escrowed mortgage loans that are being serviced or subserviced by Defendant as of June 30, 1993, and (b) all persons who formerly had escrowed mortgage loans that were serviced or subserviced by Defendant or its predecessors during the Class Period which loans were paid off, transferred or otherwise removed from Defendant's books and records, or whose escrow accounts were waived by Defendant during the Class Period.

5. The Plaintiffs as class representatives, fairly and adequately represent the interests of the class.

6. The notice previously given to class members in this action satisfies the requirements of due process and the requirements of Rule 23 Federal Rules of Civil Procedures.

7. The Settlement Agreement is fair, reasonable and adequate as to each member of the class. The court notes in this regard that only five objections were received from a class of approximately 300,000.[1]

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[1] The court also received responses from six individuals who wished to be excluded from the class. In addition, an objection and an "Option Out of Case" were filed several months after the March 8, 1994 deadline for objections. The court has reviewed the late submissions and even if they had been timely, they would not alter the court's conclusion that the

The most detailed objection was filed by Michael and Susan Crehan, who objected to the language in the settlement waiving claims they have pursued through individual litigation. The Crehan's case was dismissed on October 15, 1993 before the settlement in this case; no appeal was pending when the settlement was reached.

The court must view the settlement as a whole. *White v. National Football League*, 822 F. Supp. 1389, 1426 (D.Minn. 1993). A settlement should not be struck down on the basis of one or two provisions if, as a whole, it is fair and reasonable. *Id.* Based on the entire record, the strength of the plaintiffs' case, the benefits conferred by the settlement, the complexity of the case, and the opinions of counsel, the court finds the settlement as a whole to be fair and reasonable to the class.

8. Each member of the class is bound by the terms of the Settlement Agreement, including those regarding the ongoing servicing of their mortgage escrow accounts, and the release and covenant not to sue provided for in the Settlement Agreement between the parties. The mortgage contract of each member of the class is amended, as provided for in the-Settlement Agreement, to expressly include the provisions for ongoing servicing of the mortgage escrow impound account in the manner provided for in the Settlement Agreement.

9. Beginning on the effective date of the settlement as defined in the Settlement Agreement, or earlier at the election of Defendant, Defendant shall institute, or to the extent it has already been instituted, continue to use, the methodology for servicing the escrow accounts the class members set forth in the Settlement Agreement.

10. On the date provided in the Settlement Agreement, Defendants shall pay a total of $290,000 to Zimmerman Reed as

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settlement as a whole is fair and reasonable.

and for attorneys' fees, costs and expenses comprising of $240,000 from Defendant and $50,000 from the interest fund payable to the Class. All remaining sums to be paid under the terms of the Settlement Agreement shall then be credited or paid to members of the Class, as provided for in the Settlement Agreement.

11. All claims in the litigation against Defendant herein are dismissed on the merits and with prejudice. Each member of the class is permanently enjoined from bringing against Defendant or any of its shareholders, directors, officers, or employees any claim regarding the matters involved in this litigation. Any party violating the Court's injunction shall be required to pay the costs and attorneys' fees incurred by any released party as a result of a violation of the Court's injunction.

12. The Court hereby retains jurisdiction of all matters relating to the interpretation, administration, implementation, effectuation, and enforcement of the Settlement Agreement between the parties.

Date: 6/14/94

Diana E. Murphy
Chief Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

GRETCHEN DEBOER,
AND ALL OTHERS
SIMILARLY SITUATED,

Plaintiff,

vs.

MELLON MORTGAGE
COMPANY

Defendant.

Court File No. 4-92-CV-822

ORDER REGARDING
ATTORNEYS' FEES AND
COSTS

This matter came on for hearing before the undersigned on May 13, 1994, on the motion of Plaintiffs for approval of the Petition of the law firm of Zimmerman Reed seeking attorneys fees and reimbursement of costs and expenses in the amount of $290,000. Defendants do not oppose said motion.

The Plaintiff class was represented by Charles S. Zimmerman and Barry G. Reed of the law firm of Zimmerman Reed, 5200 Norwest Center, 90 South Seventh Street, Minneapolis, Minnesota 55402. Defendant was represented by Michael J. Bleck and Mary E. Senkus of the law firm of Oppenheimer Wolf & Donnelly, 3400 Plaza VII, 45 South Seventh Street, Minneapolis, MN 55402. Based upon the Petition of Zimmerman Reed, the arguments regarding the fairness of the settlement, and the files and records herein the Court finds and orders as follows:

1. The Plaintiff class in this action has been represented by the law firm of Zimmerman Reed. The firm of Zimmerman Reed is know by the court to be experienced and knowledgeable in the area of class action litigation, and has displayed to the Court a

thorough knowledge of the areas of dispute between the class and the Defendant regarding the mortgage escrow practices of Defendant, and the mortgage servicing industry generally, and which knowledge and experience has contributed to a settlement beneficial to the class.

2. The Court has reviewed the Petition for Attorneys' Fees and Expenses submitted by Zimmerman Reed and has determined that the amounts petitioned for are reasonable, and therefore, directs that counsel for the class shall receive the total sum of $290,000 as and for compensation for their legal services and to reimburse them for reasonable out-of-pocket costs and expenses, comprising of $240,000 from Defendant and $50,000 from the interest fund payable to the Class. Said sums to be paid directly to Zimmerman Reed by Defendant as provided for in the Settlement Agreement.

Dated: 6/14/94 Honorable Diana E. Murphy

UNITED STATES COURT OF APPEALS

FOR THE EIGHT CIRCUIT

GRETCHEN DEBOER, ETC.,

Appellee,

vs.

MELLON MORTGAGE COMPANY, ETC.,

Appellee.

MICHAEL THOMAS CREHAN, ET AL.,
Appellants.

Appeal from the United States District Court for the District of Minnesota.

Appellants' petition for rehearing has been considered by the Court and is denied.

October 25, 1995

Order Entered at the Direction of Court:
Michael E. Gais
Clerk, U.S. Court of Appeals, Eight Circuit

Rule 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Action Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in

individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in a particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgement; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgement, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(3) The judgement in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgement in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders In Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgement, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.